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# In the Supreme Court of the United States

OCTOBER TERM, 1940

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No. 408

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE  
OF A TRUST UNDER THE LAST WILL AND TESTA-  
MENT OF ANGIER B. DUKE, DECEASED, FOR THE  
BENEFIT OF ANTHONY NEWTON DUKE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE

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No. 409

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE  
OF A TRUST UNDER THE LAST WILL AND TESTA-  
MENT OF ANGIER B. DUKE, DECEASED, FOR THE  
BENEFIT OF ANGIER B. DUKE, JR., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE

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ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT

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## MEMORANDUM FOR THE RESPONDENT

We do not oppose the granting of the petition for  
writs of certiorari in these cases.

The question involved is whether commissions allowed the trustee of certain trusts for receiving and paying out principal of the trusts are deductible as "ordinary and necessary expenses paid \* \* \* in carrying on any trade or business" within the meaning of Section 23 (a) of the Revenue Act of 1928, c. 852, 45 Stat. 791. The court below upheld the denial of the deduction on the ground that the trusts could not be regarded as "carrying on any trade or business." In this respect the court below relied in part upon its decision in *Higgins v. Commissioner*, 111 F. (2d) 795, pending on petition for certiorari, No. 253, October Term, 1940.

The Government has filed a memorandum in the *Higgins* case stating that it did not oppose certiorari because of a conflict among the circuit courts of appeals on the question there presented.

The cases at bar involve trusts, while the *Higgins* case involves an individual, but the question here is sufficiently akin to that in the *Higgins* case to warrant the issuance of a writ of certiorari if certiorari is granted in that case.<sup>1</sup>

<sup>1</sup> If certiorari is granted here, the Government will undertake to support the decision below not only upon the broad ground that buying and selling securities in connection with one's investments cannot constitute a "trade or business," but also upon two additional grounds: (1) that, in any event, there was not sufficient activity here to justify classifying these transactions as connected with a trade or business; and (2) that the expenses were not "ordinary and necessary."

For the foregoing reason, the issuance of writs of certiorari in the present cases is not opposed.

Respectfully submitted,

FRANCIS BIDDLE,  
*Solicitor General.*

OCTOBER 1940.